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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 865

HOMER R. SIMMONS,
Petitioner,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT, TEXAS

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The opinion of the Court of Civil Appeals is reported: 350 S.W.2d 884, and appended hereto.

GROUNDS OF JURISDICTION

As of October 26, 1961, the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas entered judgment affirming a judgment of the District Court of Jefferson County, Texas, entered February 8, 1961 (App. A1), upon condition that the plaintiff below, Homer R. Simmons, file a remittitur in the amount of $40,000.00, in which event the judgment would be reformed and affirmed in the sum of $99,615.00 (App. A13, following opinion, App. A7-A8, 350 S.W.2d 888). The Court's opinion provided that upon filing of the remittitur "the judgment will be reformed and affirmed for the sum of $99,615.00 * * *." The petitioner filed the required remittitur under protest App. A8), along with a motion for rehearing (App. A10), which was overruled November 15, 19[illegible]. The petitioner then seasonably sought a writ of error from the Supreme Court of Texas, but his application was refused, no reversible error, on January 31, 1962 (App. A14).

On January 26, 1962, the respondent filed with the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas a motion to correct its judgment for the reason that through mathematical error, the Court had awarded petitioner a judgment of $99,615.00, when it should have awarded the sum of $94,715.00 (App. A15). On March 29, 1962, such Appeals Court, long after the judgment had become final by refusal of the application for writ of error, amended the original opinion because of a "clerical error" and struck another $4,900.00 from the recovery of the petitioner, so that he was awarded $94,715.00 through final action of that Court (App. A17).

Statutory Grounds

(1) Jurisdiction to grant this petition is sustained by *Title 28, U.S.C.A., Section 1257 (Subsection 3) (June 25, 1948, C. 646, 62 Stat. 929).*

(2) The statutes of the United States applied by the Court of Civil Appeals and the Texas Supreme Court are *45 U.S.C.A., Sections 51-59 (35 Stat. 65), as amended; 36 Stat. 291, and 53 Stat. 1404.*

(3) Jurisdiction is also sustained by *Title 28, U.S.C.A. Section 1651, Subsection (a). (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, Sec. 90, 63 Stat. 102).*

QUESTIONS PRESENTED

(1) The first question presented is whether the Court of Civil Appeals denied the petitioner the right of trial by jury in a Federal Employers' Liability Act case in contravention of the Seventh Amendment, by exercising its original discretion, not restricted by the facts adduced on the trial, so as to take from the petitioner $40,000.00; or about a third of the amount awarded him by the jury.

(2) The second question presented is whether the Court of Civil Appeals denied the petitioner a Federal right by disregarding the sound discretion exercised by the trial judge in holding the verdict and judgment not to be excessive, and substituting its original and independent judgment to factually determine the amount of damages to be allowed.

(3) The third question presented is whether the Court of Civil Appeals denied petitioner a Federal right by substituting its independent conclusion of the amount that should have been allowed as damages for that of the jury, despite reasonable support in the record of the trial court's action in holding the jury verdict and judgment not to be excessive.

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's action was brought under the Federal Employers' Liability Act, F.E.L.A. hereafter.[1]

The case involves the Seventh Amendment to the Constitution of the United States, quoted in the margin.[1a].

STATEMENT OF THE CASE

The petitioner sustained severe and permanent personal injuries that terminated in an unsuccessful operation for a herniated lumbar intervertebral disc. Examination of the separate Appendix tendered will show that he endured extreme and continuing pain, and that due to the scar tissue resulting from the operation, he suffers with a nerve root pressure or compression, and has found it necessary to move around at intervals and not remain in one position for long, whether standing or sitting. The strength of his back has been impaired to such extent that he cannot lift weights of any appreciable amount, or climb steps. In addition to the pain in his back, he has a sensation of numbness in his right leg, and has found himself not only unable

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1. 45 U.S.C.A., Sections 51-59 (35 Stat. 65) as amended; 36 Stat. 291, and 53 Stat. 1404. It is thought that the Court's familiarity with these provisions obviates the necessity of setting them out verbatim.

1a. Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law. (Amendment VII, U.S.C.A., Constitution Amendments 6 to 14).

to engage in any gainful occupation, but disabled from the performance of any of the work he formerly did about his home, and from hunting or fishing, to the extent that he followed these sports before his injuries.

The petitioner sought medical aid from at least five separate physicians or surgeons, one of whom performed the operation on him. On the trial, only one medical witness, Dr. Heinz K. Faludi, specializing in neurology and neurosurgery, testified concerning his several examinations and treatment of the petitioner. The opinion he gave was that as a residual of the disc removal and operation, the petitioner most likely had radiculitis involving the fifth lumbar and first sacral nerve roots on the right. The doctor had counseled conservative treatment, and then an exploratory reoperation in an effort to relieve the pressure, or if it could not be relieved, the sacrifice of the part of the nerve root involved by cutting it. The general statistics of disc operations would indicate that 20% of the cases would be unimproved, and 10% would actually be made worse after surgery. The doctor's opinion as to the petitioner was that he would not be in the good risk group any more, but probably would be somewhere in the poor risk group. The petitioner had resolved not to go under the knife again.

In the opinion of the medical witness, the petitioner was not in his then condition able to engage in work which required sustained heavy lifting or stooping, bending, and that sort of thing. It was his further opinion that even with a successful disc operation, lifting of 50 lbs. or more would be contra-indicated, but moderate lifting with help of knee action rather than back bending should be possible. Further, that it would be against medical advice for petitioner to do such work as climbing a 12 ft. ladder four times a day, or 6 to 12 times, and he would try to get the

patient assigned to some other type of work, since the climbing would be considered somewhat strenuous for him. The outcome of the operation would be the touchstone on the subject, and if it should fall short of the hopes and expectations for it, the petitioner might fall short of doing the work of a fireman.

The testimony was not in harmony as to the duties required of a fireman and an engineer on a diesel locomotive, but there was proof that these duties required heavy lifting and straining, climbing a ladder from the ground some 8 ft. up to the cab, the making of inspection trips through the units of the locomotive, and effecting such minor repairs as could be done on the road. Furthermore, that the seat of the fireman on the locomotive was right over the truck, so that he received a constant pounding in proceeding across rail joints or low places in the track.

During the three years before his injuries, the petitioner earned an average of some $7,200.00 a year. He was qualified under respondent's seniority system both as an engineer and fireman, and under the wage scale prevailing since the injuries of the petitioner, a fireman would average between $7,500.00 and $8,600.00 a year, while an engineer would average $9,000.00 a year, or maybe a little more. Had he not been injured, there would have been a job as an engineer open to the petitioner from the date of his injuries until the date of trial, and petitioner had some 20 years' seniority with the respondent. The petitioner had made an effort to resume his duties shortly before employing counsel around June 1, 1960, advising a legal representative of the respondent that he was willing to return to work, if the doctor would give petitioner a letter saying he was able to resume all responsibilities of a fireman and locomotive engineer, and if the representative would in turn give petitioner a letter advising that he would accept the doctor's

decision and be responsible for the condition of the petitioner. The representative of respondent declined the offer.

Mortality and annuity tables were received in evidence from which the jury would have been justified in concluding that the present value of an earning capacity of the petitioner of $625.00 per month would be $145.144.37, and that of a $750.00 per month capacity, $174.173.25. Petitioner had a life expectancy of 22.88 years.

The Federal question was timely raised by motion for rehearing filed with the Court of Civil Appeals (App. A10) after that Court applied the Texas rule for measuring damages rather than the Federal rule.

REASONS FOR ALLOWANCE OF THE WRIT

The Texas Rule of Damages

The preceding statement demonstrates that the jury verdict of less than $140.000.00 was not without support in the evidence; indeed, it was capable of being sustained on mathematical computations from the proofs adduced. The trial court, like the jury, thought the amount returned was warranted by the evidence, since he overruled the respondent's motion for new trial setting up alleged excessiveness of the verdict (Tr., State Court, 64). The Court of Civil Appeals did not in its opinion suggest that there was not evidence to support the verdict of the jury; to the contrary, it conceived it to be within its power "to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation for the injuries sustained, and treat the balance as excess," and thereafter authorized a remittitur of the excess in accord-

ance with its sound judgment.[2] Notwithstanding the fact that apparently both the jury and trial court concluded the disability of petitioner to be total, the Court of Civil Appeals, unrestricted by the proofs made, came to a contrary conclusion, thus: "We do not consider appellee as having been totally disabled (as in other cases cited)" (350 S.W.2d 888, App. A8).[2a]

Perusal of the opinion of the Appeals Court will make manifest the fact that such court not only discarded all thought of respecting any discretion in the trial court, and testing it for abuse, but did not even consider itself confined to the record made in the trial court. This is spelled out in the opinion, which refers to the help received from "precedents," and the claim of a power to adjust the jury verdict so that there should be some "reasonable uniformity as to the amount of verdicts and judgment in the various cases."[3] It would be bad enough for an appellate court to stay within the record made on trial, and arrogate to

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2. App. A7, 350 S.W.2d 887. Reliance was placed upon the Texas Rules of Civil Procedure 328, 439 and 440 (App. A17-A18), as interpreted in *Flanigan* v. *Carswell*, (Sup.) 324 S.W.2d 835.

2a. Some medical authorities question the propriety of a court or jury substituting its judgment for that of the injured party as to the extent of disability. Thus, from "The Estimation of Disability Following Injury," *Journal of the International College of Surgeons*, April, 1960—"the only person that can actually state the degree of disability is the patient himself. Vigorous objection has been raised to the publication of this statement, because it is feared that it gives *carte blanche* to the lying plaintiff and the unscrupulous lawyer. Nevertheless, it is true, and, being true, must be faced. The physician, the judge and the jury may all have opinions concerning the extent to which the person *should* be disabled, but in the final analysis disability is largely a personal matter, dependent upon the injured person's attitude toward the importance of an injury to his physical structure." (*Current Medicine for Attorneys*, September, 1961, p. 9).

3. App. A5, 350 S.W.2d 886.

itself the functions of a jury by rejecting inferences accepted by the jury and accepting inferences rejected by it, but for it to go beyond the record made and strike out for some "reasonable uniformity" as to amounts rendered in various cases, would be little short of crystal gazing.[4] Uniformity in the law there should be, but uniformity of facts in each case, or the inferences to be drawn therefrom, can never be attained. Nor should such a state of affairs be desired.

The danger of leaving with an appellate court "the ascertainment of what amount would be reasonable compensation for the injuries sustained" as an original proposition could nowhere be better illustrated than by what happened to the petitioner in the Court of Civil Appeals in this case. Presumably that Court in "its sound judicial judgment and discretion" determined that a recovery of $99,615.00 would be reasonable compensation for the injuries sustained by petitioner. It entered judgment in favor of the petitioner in this amount (App. A13). Thereafter, the same Court, on the same record, looked at the same judgment rendered by the same trial court and concluded that the judgment for the petitioner, instead of being for $99,615.00 (App. A13) in truth and fact should have been for the amount of $94,715.00 (App. A17). Whether this disparity arose from clerical error

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4. See "Texas Remittitur Practice" by Eugene L. Smith, 14 *Southwestern Law Journal*, No. 2, p. 150 at 157, thus: "It is the writer's personal opinion that a court should not go beyond the record in deciding a question of excess. In holding a jury's verdict excessive, a Court of Civil Appeals should not be allowed to use facts unknown to the jury. If the question of fact were one of evidence to sustain a finding of liability, the only value of decisions in other cases would be in deciding whether the verdict of liability were permissible as a matter of law. The remittitur power is part of the court's power to reverse and remand for a new trial; they should be limited to the record, as in other situations in which they must consider new trials.

or otherwise, it unquestionably shows that in October, 1961, the Court of Civil Appeals considered that a recovery of $99,615.00 by the petitioner would not be excessive, but in March, 1962, after its judgment had become final, the same Court concluded that like Lizzie Borden, after giving the petitioner forty thousand whacks, it might as well give him forty-nine hundred more, and concluded that $94,715.00 would be the highest amount that reason would support as recovery for the petitioner.

As we have said, whether this tossing about of $4,900.00 of the petitioner's recovery came from clerical error, mathematical mistake, or plain carelessness, it definitely shows that the verdict of a jury should not be disturbed on the question of excessiveness unless the trial court has abused its discretion in upholding the amount given. Apparently the Court of Civil Appeals in this case assumed that the judgment followed the verdict, and cut the judgment recovery of the petitioner without even knowing its exact amount!

The singularity of the Texas procedure does not end with the unusual power given the Courts of Civil Appeals to star gaze beyond the record that was before the trial court and jury in arriving at the factual findings such court thinks the jury should have made. The varying rules of remittitur (App. A17-A18) have been interpreted to mean that should the trial court require a reduction of the verdict as a condition for overruling new trial, his discretion in reducing the amount recovered would not be subject to review unless abused, but if the same discretion should be exercised to reject the plea of excessiveness, the Court of Civil Appeals could enter its trip into the great beyond and decide originally whether it thought the verdict ren-

dered was too large or too small.[5] The Texas Rule seems to adhere to the sporting theory of justice, with the dice loaded against the injured party. If the trial court reduces the verdict, the Appeals Court may not restore the amount cut unless the trial court's action was manifestly unjust "in the light of all the facts and circumstances" of the record;[6] but if the same discretionary power of the trial court is exercised to disallow a claim of excessiveness, the Court of Civil Appeals is on its own and may look beyond the facts and circumstances of the record and reverse if it independently considers the verdict too large. This double standard does not address itself well to either policy or logic.

Prior to the decision in *Flanigan*,[7] the Texas Court purported to allow a remittitur only where the verdict was tainted by passion and prejudice.[8] Even after that decision, some of the Texas Courts of Civil Appeals have continued to follow the earlier rule,[9] which gave the jury ver-

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5. *Flanigan* v. *Carswell*, (Sup.) 324 S.W.2d 835 (1959), severely criticized by the Court of Civil Appeals that was forced to apply the rule, 329 S.W.2d 902, 904 (1960).

6. 324 S.W.2d 841.

7. *Ibid.*

8. *Galveston, H. & S. A. R. Co.* v. *Hynes*, 50 S.W. 624, Tex. Civ. App. 1899, eff. ref.; 29 *Texas Law Review* 347, 351; *Henwood* v. *Moore*, 203 S.W.2d 973, 976 (1947), where court made express finding that the jury was influenced by passion, sentimentality, or some other improper motive; *Sharpe* v. *Minor*, 256 S.W.2d 890; *Pruett* v. *Mabry*, 263 S.W.2d 532, 539; 17 Tex. Jur. 2d, Damages, Sec. 341, p. 415; *Texas & N. O. R.* v. *Haney*, 144 S.W.2d 677 (1940), err. dism., cor. judg.

9. For example, see the following F.E.L.A. cases: *Missouri Pacific R. Co.* v. *Mendoza*, 330 S.W.2d 622, 630; *T. & N. O. R. Co.* v. *Perez*, 346 S.W.2d 369, 373; *Missouri Pacific R. Co.* v. *Ramirez*, 326 S.W.2d 50, 55; *Missouri Pacific R. Co.* v. *Kimbrell*, 326 S.W.2d 720, aff'd 334 S.W.2d 283; *Missouri Pacific R. Co.* v. *Young*, 335 S.W.2d 679; and *Missouri Pacific R. Co.* v. *Handley*, 341 S.W.2d 203, 205.

dict and the trial court's action in rejecting a claim of excessiveness the benefit of the doubt.

It is believed that the cases last footnoted apply a different test to that prescribed by the Texas Supreme Court in *Flanigan*,[10] and if this be true, the F. E. L. A. claimant will find that the measure of his rights under the Federal Act varies not only to the extent of the variation between the Texas and Federal rule generally, but in accordance with where his case is reviewed on appeal. Since there are eleven Courts of Civil Appeals in Texas,[11] and the Texas Supreme Court has and exercises power to transfer cases from one to the other in equalization of their dockets,[12] the sport and variety of appellate review is increased. Additional zest is assured in searching for the touchstone of "reasonable uniformity as to the amount of verdicts and judgments in the various cases"[13] by the holding of the Supreme Court that it has no jurisdiction to review the factual question of excessiveness,[14] the judgment of the Courts of Civil Appeals being final on the facts of the case.[15] Prior to the *Flanigan* decision, in 1958 the Supreme Court described a holding that a verdict was excessive as being one where "there is no rule prescribing the manner by which the court determines the amount of remittitur."[16]

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10. 324 S.W.2d 841.

11. Art. 1817, Vernon's Annotated Civil Statutes of Texas, V.A.C.S., hereafter.

12. Art. 1738, V.A.C.S. (material portions copied Appendix A18-A19).

13. Opinion herein, App. A5, 350 S.W.2d 884, 886.

14. *Flanigan* v. *Carswell*, 324 S.W.2d 835, 839.

15. Art. 1820, V.A.C.S., reading: "The judgments of the Courts of Civil Appeals shall be conclusive in all cases on the facts of the case."

16. *Adams* v. *Houston Light & Power Co.*, 314 S.W.2d 826, 830.

We do not think we have unfairly characterized the state of the Texas law on the question of excessive damages. Considered most charitably, it conceives the power of the Court of Civil Appeals to embrace a weighing of the evidence adduced on the trial with the substitution of its conclusion for that of the jury and trial court as to the amount of damages that should have been allowed; but more accurately, the courts determine the amount of remittitur by independently deciding what they consider would have been a reasonable verdict, and then arbitrarily declaring the remainder to be excess.

The Federal Rule

It is elemental that in treating of F. E. L. A. cases, the state courts must apply the rule of decisions of the Federal courts.[17] The principle has been accepted as applicable to rules with respect to the amount and proper measure of damages, said to be inseparably connected with the right of action under the F. E. L. A.[18] The Federal rule requires respect for the jury verdict attacked for excessiveness to the extent of demanding that the action of a

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17. *N. Y. C. R. Co.* v. *Winfield*, 244 U.S. 147, 61 L. Ed. 1045, and cases cited in the opinion; 12 A.L.R. 698; 36 A.L.R. 917.

18. *Chesapeake & O. R. Co.* v. *Kelly*, 241 U.S. 485, 60 L. Ed. 1117; *G. C. & S. F.* v. *Moser*, 275 U.S. 133, 72 L. Ed. 201 (charge on present cash value of damages recovered); *Chicago, R. I. & P. R. Co.* v. *Devine*, 239 U.S. 52, 60 L. Ed. 140 (refusal to limit F.E.L.A. damages for death to $10,000.00 as required by Illinois statute); *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F.2d 847, 848; *Briggs* v. *Penn. R. Co.*, 164 F.2d 21, aff'd 334 U.S. 304, 92 L. Ed. 1403 (dealing with interest to be allowed on judgment, and both holding measure of damages inseparably connected with F.E.L.A. under which actions brought); *Texas Pacific-Missouri Pacific Term. R. Co. of New Orleans* v. *Welsh*, (1950) 179 F.2d 880, 882 (duty of appellate courts to reduce excessive verdict required by Louisiana law held inapplicable to case brought under F.E.L.A.)

trial court in denying a new trial sought on such grounds must be upheld if it has support in the record.[18a]

In no area has the battle of the majority of this Court to breathe life and meaning into the F. E. L. A. raged more vigorously than on the subject of trial by jury under the Act. To emphasize the importance of the questions raised in this petition, we beg leave to outline the obstacles earlier placed in the way of recovery under the Act by both State and Federal courts, to indicate the slow and painful development of the conception finally evolved by the majority of this Court.

Before 1939

The exception of employees injured through the violation of safety appliance acts from the bar of assumption of risk[19] was seized upon as a means of stringently curtailing the rights of those whose actions did not fall within the reach of the Safety Appliance Act.[20] The cases annotated as indicated in the last footnote subjected the employee under the Act to the assumption of risk of everything from defective track and insufficient clearance to negligent movement of cars and engines, so long as the danger was obvious or known.

Other strictures on recovery arose from a rigid construction of the requirement that the employee be injured

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18a. *Nesse* v. *Southern R. Co.*, 350 U.S. 77, 100 L. Ed. 60, 61. Also see *U. S.* v. *Guyer*, 218 F.2d 266, 269, reversed as *Snyder* v. *U. S.*, 350 U.S. 906, 100 L. Ed. 796 (*post*, 30 *et seq.*).

19. 45 U.S.C.A., Sec. 54, April 22, 1908, c. 149, Sec. 4, 35 Stat. 66.

20. *Gila Valley G. & N. R. Co.* v. *Hall*, 232 U.S. 94, 58 L. Ed. 521; *Seaboard Airline R. Co.* v. *Horton*, 233 U.S. 492, 58 L. Ed. 1062, and *C. & O.* v. *DeAtley*, 241 U.S. 310, 60 L. Ed. 1016. U.S.C.A. carries 246 footnotes, covering 141 pages following Sec. 54 (Sec. 4) of the Act (45 U.S.C.A. 54, pp. 114-256).

while employed in interstate commerce.[21] The hapless employee prior to 1939 might find himself moving within and without the reach of the F. E. L. A. many times in the course of a single switching operation.[22] The shop-worker fared no better, and might find himself covered by the Act in the front shop, where minor repairs were being made on locomotives not withdrawn from service, but beyond its reach when he strolled into the back shop to do work on a locomotive that had been withdrawn for an overhaul.[23] The construction worker, once off the interstate highway,[24] found his coverage under the Act governed by the happenstance of whether the instrumentality on which he was working had been dedicated to interstate commerce,[25] or whether the work was "new construction" or renovation of old.[25a]

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21. 45 U.S.C.A., Sec. 51: Annotations, pp. 230-324: Notes 261-376.

22. For example, see *Illinois C. R. Co.* v. *Behrens*, 233 U.S. 473, 478, 58 L. Ed. 1051, 1055; *Chicago & Eastern Ill. R. Co.* v. *Industrial Commission of Illinois*, 284 U.S. 296, 76 L. Ed. 304; and *Chicago, B. & Q. R. Co.* v. *Harrington*, 241 U.S. 177, 180, 60 L. Ed. 941, 942, where the fact that coal being switched was to go into both intrastate and interstate locomotives and that switchman previously had been engaged in interstate commerce, and it was contemplated he would be so engaged after his immediate duty of moving intrastate freight was completed, was held insufficient to bring him within the Act.

23. *New York, N. H. & H. R. Co.* v. *Bezue*, 284 U.S. 415, 419, 76 L. Ed. 370, 374; *Industrial Accident Commission* v. *Davis*, 259 U.S. 182, 187, 66 L. Ed. 888, 892.

24. *Kinzell* v. *Chicago, M. & St. P. R. Co.*, 250 U.S. 130, 63 L. Ed. 893; *Pedersen* v. *Delaware L. & W. R. Co.*, 229 U.S. 146, 57 L. Ed. 1125.

25. *Shanks* v. *Delaware L. & W. R. Co.*, 239 U.S. 556, 559-560, 60 L. Ed. 436, 438; *Minneapolis & St. L. R. Co.* v. *Nash*, 242 U.S. 620, 61 L. Ed. 531

25a. *Raymond* v. *Chicago M. & St. P. R. Co.*, 243 U.S. 43, 45, 61 L. Ed. 583, 585; *New York C. R. Co.* v. *White*, 243 U.S. 188, 192, 61 L. Ed. 667, 670.

Judicial restriction of rights under the Act was even extended to operate after the death of the employee, and although Congress had gone to great pains to leave out of the Act provisions fatal to the Lord Campbell type of death act, judicial interpretation added them.[26] At the other extremity, one actually serving as a switchman was denied recovery because he had procured his employment through fraudulently concealing a physical ailment, albeit the ailment had no causal relation to his later injuries.[27]

In the early 20's, a state statute making it the personal duty of an engineer when approaching a crossing with another railroad to stop and ascertain that the train could safely resume its course was held to impose upon the engineer the sole duty of avoiding collision, even though his fireman on the opposite side of the enginer from which the colliding train approached was in better position to observe it.[28] This conception of "primary" or "positive" duty capable of excluding recovery although the negligence of other employees may have contributed as a proximate cause to the death of the deceased employee was reapplied in 1924[29] and 1928.[30] Needless to say, this interpretation

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26. *Mellon* v. *Goodyear*, 277 U.S. 335, 344, 72 L. Ed. 906, 910.

27. *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock*, 279 U.S. 410, 414-415, 73 L. Ed. 766, 770. Rock had flagged a physical examination, and in the course of the opinion, it was held that his duty to disclose his identity and physical condition was a continuing wrong against the defendant. Apparently the railroad did not counterclaim for wages paid prior to Rock's injuries.

28. *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U.S. 1, 3, 68 L. Ed. 131, 132. To quote: "Whatever may have been the practice, he (the engineer) could not escape this duty (to ascertain if the train could safely resume its course), and it would be a perversion of the (F.E.L.A.) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

29. *Davis* v. *Kennedy*, 266 U.S. 147, 148, 69 L. Ed. 212, 216.

30. *Unadilla Valley R. Co.* v. *Ernest Caldine*, 278 U.S. 139, 141, 73 L. Ed. 224, 232.

nullified the Congressional intent of permitting recovery where injury or death of an employee results "in whole or in part from the negligence of any of the officers, agents or employees of such carrier." It will be observed that the Act did not confine recovery to instances of negligent contribution by "superior" officers, agents or employees, but the cases footnoted read such limitation into its provisions.

We have thus far treated of what are believed to be judicial barricades erected between the employee injured under the F. E. L. A. and recovery by him or his beneficiaries. In our humble opinion, however, the worst blow to the basic purpose and philosophy of the Act was delivered in those cases where the right and extent of recovery depended upon a jury determination of factual issues. It is in this most sensitive area that the beneficent purposes of the Act have undergone the strongest assault. As an example of the critical judicial eye turned upon verdicts favorable to employees or their beneficiaries may be cited those where the verdict was said to have rested on "conjecture and speculation"[31] or upon building an inference upon an inference.[32]

Equal judicial concern was shown to assure that a jury verdict on causal negligence was supported by positive rather than inferential evidence. Thus, where a brakeman

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31. *Gulf, M. & N. R. Co.* v. *Wells*, 275 U.S. 456, 458, 72 L. Ed. 370, 372. Despite the positive testimony of one situated ten car lengths away from an engine that "the engine gave an unusual jerk", the statement was held to be a mere conjecture, incapable of supporting a charge of negligence.

32. *Penn. R. Co.* v. *Chamberlain*, 288 U.S. 333, 339, 77 L. Ed. 819, 823. The testimony of an eye witness as to hearing a "loud crash" and shortly thereafter seeing a string of cars that had been following another string at a greater rate of speed moving along together was held to afford no inference of a collision between the cars, or merely to afford equal support to each of two inconsistent inferences, which in turn was held insufficient to take the question to a jury.

was last seen alive while running westwardly by the side of a train moving in that direction, and blood was found upon the rail 8 or 10 feet west of a defect in the pathway commonly used by trainmen, together with a footprint in the soft area that "looked as though somebody that was heavy or running had stepped in it," nothing but conjecture as to the cause of fatal injury was said to exist.[33] Perhaps the keystone to the pre-1939 approach of the courts to the consideration of the factual support of a jury verdict in F. E. L. A. cases is explained by this quotation from the opinion in the case last footnoted:

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

Eight years after *Saxon*, the picture began to change.

After 1939

The F. E. L. A. was amended by Congress in 1939 to extend exemption from assumption of risk by the employee to cases based on ordinary negligence as well as those based on the violation of the Safety Appliance Act.[34] and so as to broaden the coverage under the conception of interstate commerce.[35] Soon after the amendment, a welcome change could be discerned in the judicial approach to a consideration of the protection afforded by the Act. The art of semantics which would have transformed the earlier conception of assumed risk to a rule of "no duty," or "no negligence," was forcefully and admirably rejected by this Court

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33. *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U.S. 458, 459, 76 L. Ed. 397, 399.

34. August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U.S.C.A., Sec. 54.

35. 45 U.S.C.A., Sec. 51.

in 1940.[36] It was not until 1955 that the "moment of injury" and "new construction" doctrines with respect to engagement in interstate commerce were swept into the dust bin, but the sweep was a clean one.[37] On the same day, an effort to limit the benefits of the Act "to those who have cinders in their hair, soot on their faces, or callouses on their hands," was rejected by the holding that a railroad's clerical employee was covered thereby.[38]

Far more dramatic than the acceptance of fresh conceptions of the interpretation of legal terms has been the successful effort of the majority of this Court since 1939 to rescue the right of trial by jury under the F. E. L. A. from the serious injury done it by the philosophy so well expressed in *Saxon*.[39] A partial but admirable treatment of this restoration up to 1956 is found in an article by Prof. Leon Green, published in 65 *Yale Law Journal* at page 482, 488, *et seq.* Without placing blame on a former teacher, we

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36. *Tiller* v. *Atlantic Coast Line R. Co.*, (1940) 318 U.S. 54, 87 L. Ed. 610. On subsequent appeal, 323 U.S. 574, 89 L. Ed. 465. The concurring opinion gives a clue to the basis of later schisms on the Court with respect to the F.E.L.A. Also see *Blair* v. *Baltimore & O. R. Co.*, 323 U.S. 600, 89 L. Ed. 490.

37. *Southern P. Co.* v. *Gileo*, 351 U.S. 493, 499-500, 100 L. Ed. 1357, 1365.

38. *Reed* v. *Penn R. Co.*, 351 U.S. 502, 506, 100 L. Ed. 1366, 1374. The dissenters seemed willing to abandon the requirement that an employee's work must relate to interstate transportation at the moment of injury, but complained that it was "not necessary to jump over the moon and wipe out the basic distinction between those whose duties are tied to transportation * * * and those * * * who are exposed by way of permanent occupation to no greater or different potential hazards than are the thousands upon thousands of like workers in offices other than those of railroads * * *."

39. *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U.S. 458, 459, 76 L. Ed. 397, 399 (*supra*, 19).

gratefully acknowledge that our approach has been inspired by his treatment of the subject.

The troublesome quadruplets of "speculation and conjecture"[40] and "inference upon inference"[41] were laid in well-deserved and dishonorable graves in 1946 by the majority of the Court.[42] Earlier, the Court had taken occasion to say that the right to trial by jury is part and parcel of the remedy afforded under the F. E. L. A.,[43] and that the essence of the jury's function was to select from conflicting inferences and conclusions that considered most reasonable which, when found, "whether it relates to negligence, causation, *or any other factual matter*, cannot be ignored."[44]

The luxury of reshaping a jury finding under the F. E. L. A. was far too well engrained in the lower appellate courts for ready acceptance of the pronouncements just summarized. It was necessary for this Court to remark in 1949 that an opinion of the Supreme Court of a state "strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad

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40. *Gulf, M. & N. R. Co. v. Wells*, 275 U.S. 456, 458, 72 L. Ed. 819, 823 (*supra*, 18)

41. *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 339, 77 L. Ed. 819, 823 (*supra*, 13)

42. *Lavender v. Kurn*, 327 U.S. 645, 653, 90 L. Ed. 916, 923. Recently, *Rock* (*supra*, 17), was not buried, but relegated to limbo by confinement of its reach to cases involving the precise fact question there determined. The concurring opinion contained a judicial whimsy to the effect that it was trusted that the limitation did not mean that the plaintiff must be named Rock; a limitation that the writer would gleefully impose from his partisan standpoint. See *Still v. Norfolk & Western Ry. Co.*, 7 L. Ed. 2d (Adv.) 103, 82 S. Ct. , U.S.

43. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 87 L. Ed. 1444, 1448.

44. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520, 525.

rested on that court's independent resolution of conflicting testimony."[45] The case was further notable for its bold renunciation of the doctrine that simply because issues of negligence are left to a jury, the railroads are made insurers, a sentiment said to rest on the unarticulated assumption that juries will invariably decide negligence questions against railroads, which is contrary to fact.[46] Additionally, the concurring opinion in the case bluntly asserted that the F. E. L. A. was designed "to put on the railroad industry some of the cost of the legs, eyes, arms and lives which it consumed in its operations. Not all of these costs were imposed, for the Act did not make the employer an insurer."

The October, 1956, term of this Court may well be considered as a landmark in the efforts of the majority of the Court to preserve the integrity of the jury system in F. E. L. A. cases, "over vigorous dissent that the time taken with these cases was not well spent."[47] First, a judgment of the Supreme Court of Missouri was set aside in an opinion that eschewed treatment of the refinements of negligence and proximate causation, and emphasized that the test of whether a jury case is made under the statute "is simply whether the proofs justify with reason the conclusion that the employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[48]

On the same date of the *Rogers* opinion, three other cases were decided, in one of which the proof was held in

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45. *Wilkerson v. McCarthy*, 336 U.S. 53, 55, 93 L. Ed. 497, 501.

46. *Id.*, 336 U.S. 62, 93 L. Ed. 504.

47. *Calabrotto v. New York, N. H. & H. R. Co.*, 287 F.2d 394 through Clark, Circuit Judge, 2nd Cir.

48. *Rogers v. Mo.-Pac. R. Co.*, 352 U.S. 500, 506, 1 L. Ed. 2d 493, 499.

sufficient to raise an issue of negligence.[49] Other memorandum opinions made plain that *Rogers* was to be the accepted test henceforth.[50] At the next term of the Court, the remnants of the approach employed in *Saxon*[51] were shattered in a case where the circumstances surrounding unwitnessed fatal injuries were not so strong as those surrounding the death of Saxon.[52]

The Texas Outlook

Unquestionably, as the philosophy of this Court operated to liberalize the F. E. L. A. after 1939 in favor of the employee, that of the appellate courts of Texas moved in the opposite direction. The Texas Courts assuredly fell within the category described in this quotation from the *Rogers* opinion: "Special and important reasons for the grant of certiorari in these (F. E. L. A.) cases are certainly present when lower Federal and state courts persistently deprive litigants of their right to a jury determination" (*Rogers*, 352 U.S. 510, 1 L. Ed. 2d 502).

During the 1956 term, a judgment of the Seventh Court of Civil Appeals of Texas had to be reversed to compel respect for a jury finding of negligence and Federal rights that were being denied under the guise of following local practice.[53] At the next term of Court, it was necessary

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49. *Herdman v. Penn. R. Co.*, 352 U.S. 518, 1 L. Ed. 2d 508.

50. *Shaic*, 353 U.S. 920, 1 L. Ed. 2d 718; *Futrelle, Admx., v. Atlantic Coast Line R. Co.*, 353 U.S. 920, 1 L. Ed. 2d 718; *Thompson v. Texas & Pac. R. Co.*, 353 U.S. 926, 1 L. Ed. 2d 722.

51. *Atchison, T. & S. F. R. Co. v. Saxon*, 284 U.S. 453, 459, 76 L. Ed. 397, 399, *supra* 14.

52. *Stevens v. Atlantic Coast Line R. Co.*, 355 U.S. 52, 2 L. Ed. 2d 93.

53. *Arnold v. Panhandle & S. F. R. Co.*, 350 U.S. 360, 1 L. Ed. 2d 889.

to reverse the Supreme Court of Texas in an F. E. L. A. case where it had attempted to apply the "Mother Knows Best" principle in testing safety measures applied to a yard built to "specifications advanced and approved by the best qualified construction engineers in America."[54] Deserving of special treatment, however, is the saga of Earl R. Deen, whose F. E. L. A. case progressed in and out of the Texas courts and this Court over a period of years.

The Eleventh Court of Civil Appeals reversed and rendered judgment against Deen on the ground that there was no evidence of employer negligence under the Act.[55] In due course, the Appeals Court judgment was reversed here, by memorandum opinion.[56] Despite a show of some judicial pique, the Appeals Court accepted this Court's judgment, and although considering itself precluded from holding the jury verdict against the overwhelming weight and preponderance of the evidence, nevertheless exercised its power of requiring a remittitur in the sum of $5,500.00.[57] The Texas Supreme Court reviewed the last Appeals Court judgment, holding that such court had the same powers as a trial judge in the matter of upholding or setting aside verdicts "by reason of evidence or deficiency therein."[58] In the course of the opinion that remanded the case to the Court of Civil Appeals, the Texas Supreme Court directed that Court to adjudicate upon its own independent

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54. The quotation: 298 S.W.2d 106; the case: *Gibson v Thompson*, 355 U.S. 18, 2 L. Ed. 2d 1.

55. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 275 S.W.2d 889.

56. *Deen v. Gulf, Colorado & Santa Fe R. Co.*, 353 U.S. 529.

57. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 306 S.W.2d 171, 174-175.

58. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 312 S.W.2d 933, 937.

evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the U. S. whether or not the finding of negligence below was so against the weight of the evidence as to require a new trial in the interest of justice. In order to prevent the Texas Supreme Court from requiring the Court of Civil Appeals to substitute its judgment not only for that of the jury, but of the U. S. Supreme Court, it was necessary to invoke this Court's power of mandamus.[59] Again back in the Texas Supreme Court, Deen requested that the amount ordered remitted be restored, since the F. E. L. A. does not contemplate the granting of remittiturs, but this was refused, albeit with one strong dissent.[60]

Earlier in the proceedings, Deen had filed a remittitur "in the hope of terminating the litigation but reserving the right to complain of the action of the Court of Civil Appeals as depriving him of the right of trial by jury under the F. E. L. A., if Santa Fe refused to accept the remittitur and prolonged the litigation" (Application for Certiorari No. 698, pp. 2 and 9, *Earl R. Deen, Petitioner, v. Gulf, Colorado & Santa Fe Ry. Co.*). Deen's desire to be done with the Texas appellate courts is understandable, but whether the language used was considered by this Court as indicating a willingness to accept the remittitur or not, his application for certiorari was denied, with Mr. Justice Douglas indicating his opinion that certiorari should be granted.[61]

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59. *Earl R. Deen v. Hon. J. E. Hickman et al.*, 358 U.S. 57, 3 L. Ed. 2d 28.

60. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 317 S.W.2d 913, 915.

61. *Earl R. Deeen, Petitioner, v. Gulf, Colorado & Santa Fe R. Co.*, 359 U.S. 945, 3 L. Ed. 2d 678.

Although this Court has said, that, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times,"[62] the Texas Supreme Court has concluded that the denial of the writ in Deen thenceforward placed authority in the Courts of Civil Appeals to require remittiturs.[63]

The Heel of Achilles

At the risk of tedium, we have brought the Court to the query of whether "the sustained efforts of the Supreme Court majority to preserve the integrity of the jury system"[64] in F. E. L. A. cases are to come to naught through the device of ignoring the jury's conclusion as to the correct *amount* that should be awarded an injured employee. Does there remain, despite the valiant efforts of the majority of this Court, an Achilles' heel which leaves the Federal rights of the employee under the F. E. L. A. vulnerable to destruction in the guise of requirements of remittiturs? Is it not a matter of small moment whether the "lower Federal and state courts persistently deprive litigants of their right to a jury determination" in the realm of primary liability, or in that of the proper amount of damages found by the jury? Why should the scope of the *Tennant* opinion[65] preserving for the jury the right to make what it considers the most reasonable conclusion "whether it relates to negli-

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62. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403-4; 75 L. Ed. 1142, 1143.

63. *Missouri Pac. R. Co. v. Kimbrell*, 334 S.W.2d 283, 287. The confusion has spread to Illinois, where the same conclusion has been expressed. (*Smith v. Ill. Cent. R. Co.*, (Ill. App.) 172 N.E.2d 803, 804).

64. *Calabritto v. New York, N. H. & H. R. Co.*, 287 F.2d 394, through Clark, Circuit Judge, 2nd Cir.

65. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520, 525, *supra* 21.

gence, causation, *or any other factual matter*" be limited to factual matters other than those pertaining to damages? Is there more reason to deny the Supreme Court of a state the right to rest its finding of an absence of negligence on the Court's independent resolution of conflicting testimony,[66] than to deny a state appellate court the right to find lesser damages than awarded by a jury, based on its independent resolution of conflicting testimony and a consideration of amounts awarded in other cases?

In the present case, the Appeals Court considered in October, 1961, that $99,615.00 was a reasonable recovery for the petitioner herein. The uninitiated observer might conclude that this was indeed appellate sharp shooting, yea, down to dollars of the first digit. The skeptical might ask, why not $98,000? Why not $100,000? Or, $96,000? These are not invalid questions, for the same Court that considered that the sum of $99,615.00 would be a reasonable recovery for the petitioner in October, 1961, has come to the conclusion that the figure pounced upon was the result of a clerical error, and that in truth the reasonable recovery of the petitioner, on the same record, with the same injuries, the same trial court judgment, and the same chances of future employment of the petitioner was, on March 29, 1962, the sum of $94,715.00 (App. A17).

In this case, the Court lopped off almost a third of the petitioner's recovery. There is no reason for saying that in future F. E. L. A. cases it may not lop off a half, two-thirds, three-fourths, or 99%. Indeed, the same Court which found the varying amounts of October, 1961 and March, 1962, as the proper quantum of recovery by petitioner a little earlier found that less than one-fourth of the recovery allowed after a trial court requirement of

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66. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55, 93 L. Ed. 497, 501.

$38,500.00 remittitur was reasonable, and slashed the verdict of the jury by 75.420733% of the amount allowed to stand by the trial court. The net result of the two reductions for excessiveness operated to take away 84.5[illegible]6% of the verdict of $103,785.00 actually awarded by the jury.[67]

With the appellate courts free to cut and slash a jury verdict in this manner, a Federal right subject to such assault amounts to no right at all. But the peril does not end with the power of reduction; the Texas Supreme Court reserves unto itself the right to destroy a jury finding of damages in its entirety. This power was claimed prior to the decision in *Flanigan*[68] in the *Hicks* case,[69] and exercised as late as March 10, 1962.[70] In the case last noted, the Court of Civil Appeals reduced exemplary damages from $10,000 to $5,000.00 because excessive, and the Supreme Court of Texas granted an application for writ of error on the point that a new trial should have been granted because the damages were so grossly excessive as to manifest passion and prejudice and a complete disregard of the evidence by the jury. This principle, in our humble opinion, is in complete disagreement with the decision of this Court in the *Neese* case,[71] in which it will be remembered that the Circuit Court for the Fourth Circuit attempted to exercise just such a power of disregarding a jury verdict of damages because it was not supported

67. *Texas & N. O. R. Co.* v. *Broadway*, 345 S.W.2d 814, 821.

68. *Flanigan* v. *Carswell*, 324 S.W.2d 835.

69. *World Oil Co.* v. *Hicks*, 103 S.W.2d 962.

70. See *Ware* v. *Paxton et al.*, 5 Tex. S. Ct. Journal No. 22, p. 301; op. rep. C.C.A. 352 S.W.2d 520.

71. *Neese* v. *Southern Railway Co.*, 350 U.S. 77, 100 L. Ed. 60 (post 30).

by the record.[72] To summarize, the Federal rule does not permit disregard of a jury verdict on damages where the action of the trial court in upholding it has support in the record, but the Texas rule permits the setting aside of a jury verdict that has support in the record if it occurs to the Texas Supreme Court that it is so excessive as to manifest passion and prejudice on the part of the jury.

If this be the law in F. E. L. A. cases, then it matters not how solicitous this Court may be of trial by jury on liability issues. The appellate courts will simply take away with their left hand what this Court has required them to bestow with their right hand.

The Federal Rule vs. the Texas Rule

There can be no doubt that the rule of damages as applied in Texas is at war with all conceptions of the Federal rule. We say "all conceptions" in light of the fact that it is our belief that the Federal rule could stand some clarification.[73] Earlier Federal decisions seem to restrict appellate review to law questions alone, and deny the existence of any right of appellate review of facts found by a jury.[74] In 1955, this Court found it unnecessary to pass on the constitutional question we raise, but did make it clear

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72. Ib., 216 F.2d 772, 776.

73. This is demonstrated by the treatment of the subject of Prof. Moore in *Moore's Federal Practice*, Vol. 6, pp. 3833-3841.

74. For example, see *Herencia* v. *Guzman*, 219 U.S. 44, 45, 55 L. Ed. 81; *Southern Ry. Co.-Carolina Division* v. *Bennett*, 233 U.S. 80, 87, 58 L. Ed. 860, 863; *Dimick* v. *Schiedt*, 293 U.S. 479, 79 L. Ed. 603, 611; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 77 L. Ed. 439, 445, wherein Mr. Justice Brandeis gave this helpful admonition: "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

that in passing on the question of excessiveness of damages appellate review was restricted to a consideration of whether the action of the trial court in denying a new trial based on the grounds of alleged excessiveness had support in the record.[75] The writer thinks the *Neese* test has the virtue of stability, and if it is to be considered that there is no constitutional inhibition to appellate review of the amount of damages awarded, that it should be pronounced on review of this case to end the confusion found among the various Circuit Courts of Appeal as well as state appellate courts. For example, we find some Circuit Courts approaching the question of excessiveness in reliance upon the notion first brought forward in *Barry v. Edmonds*, 116 U.S. 550, 565, that the verdict must be so outrageous as to demonstrate that the jury acted on passion and prejudice, as approved as late as 1949 in *Affolder v. New York C. & St. L. R. Co.*, 339 U.S. 96, 94 L. Ed. 683, 688, by use of the word "monstrous."[76] In other Federal Circuits, adherence is yet given to the view that the appellate courts have no power to review a jury finding of damages.[77] Closely related to the view maintained in those circuits that require a verdict to be monstrous, fantastic, outrageous, etc., before even the trial court can interfere with the same, is the conception in other circuits

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75. *Neese v. Southern R. Co.*, 350 U.S. 77, 100 L. Ed. 60, 61. Also see *U. S. v. Guyer*, 218 F.2d 266, 269, rev. as *Snyder v. U. S.*, 350 U.S. 906, 100 L. Ed. 796.

76. *Northern Pac. R. Co. v. Everett*, 232 F.2d 488, 495; *LaFrance v. New York, New Haven & Hartford R. Co.*, 292 F.2d 649, 650; *C. & O. R. Co. v. Newman*, 243 F.2d 804; *Hulett v. Brinson*, 229 F.2d 22, cert. den. 76 S. Ct. 659. We have cited but a few cases as samples.

77. *St. Louis S. W. R. Co. v. Ferguson*, 182 F.2d 949, 954, *et seq.*, and cases there treated. *Moore's Federal Practice*, Vol. 6, p. 3834.

that an abuse of discretion of the trial court must be shown before there may be appellate review on the question of excessiveness.[78] In short, there is no uniformity in the opinions of the various Federal Circuit Courts on the subject.

Perhaps the most exhaustive treatment of the divergence of opinion among the various circuits is found in *Dagnello* v. *Long Island R. Co.*, 289 F.2d 797. The Second Circuit there rejects all suggestion that there may be no appellate review on the question of excessiveness of a verdict, but it strongly and clearly points out that it considers the review made must be on a question of law. In last analysis, the opinion confines the right of review to cases where the trial court may be said to have abused his discretion in overruling a motion for new trial based on excessiveness of the verdict.

Under no possible interpretation of the Federal rule could it be said that the test applied in Texas (*supra*, pp. 8-14) is consistent therewith.

The Rule of Practice

Some state Courts have concluded that the determination of a contention of excessiveness of a verdict is one of mere procedure, governed by the law of the state, rather than the Federal decisions under the F. E. L. A.[79] On the other hand, in construing the Jones Act (46 U.S.C.A., Sec. 688), which simply adopts the F. E. L. A. provisions

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78. *McCoy* v. *Cate*, (1 Cir.) 117 F.2d 194; *Moore's Federal Practice*, Vol. 6, p. 3836, *et seq.*

79. See, for example, *Joice* v. *M., K. T. R. Co.*, 189 S.W.2d 568, 161 A.L.R. 383, 394; *Counts* v. *Thompson*, (Mo.) 222 S.W.2d 487, 495; *Avance* v. *Thompson*, (Ill. App.) 51 N.E.2d 334, 340, reversed on other grounds, 55 N.E.2d 57, cert. den. 323 U.S. 753; and *Rivera* v. *Atchison, T. & S. F. R. Co.*, (N. M.) 299 P.2d 1090.

as to seamen, the Supreme Court of Oregon felt compelled to apply the rule of Federal decisions on the question of excessiveness of a verdict even to the extent of remanding a cause to the trial court to determine whether a new trial should be granted on the ground of excessive damages, despite the fact that the state constitution denied such power to the trial court.[80] Subsequent to the decision in the *Avance* case footnoted, the Appellate Court of Illinois, Fourth District, reversed itself on the question, and in obedience to the *Neese* case[81] refused to weigh the evidence or review the exercise of discretion by the trial court in handling the issue of excessiveness, since it simply had no criterion for doing so under the *Neese* decision.[82] Even later, the same Court reversed itself again, under the erroneous conception that denial of certiorari in *Deen*[83] operated as an express affirmance by the United States Supreme Court of the state court power to pass on the question of excessiveness of verdicts.[84]

It is not believed that this Court would permit Federal rights vouchsafed by the F. E. L. A. to be destroyed under the name of local practice. As well said in the *Brown*[85]

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80. *Hust* v. *Moore-McCormack Co.*, 180 Ore. 409, 177 P.2d 429.

81. *Neese* v. *Southern R. Co.*, 350 U.S. 77, 100 L. Ed. 60, 61.

82. *Pennell* v. *Baltimore & O. R. Co.*, 13 Ill. App. 2d 433, 142 N.E.2d 497, 501, as quoted in the dissenting opinion in *Gulf C. & S. F. R. Co.* v. *Deen*, 317 S.W.2d 913, 916; *Coleman* v. *Gulf M. & O. R. Co.*, (App. Ct. Ill., 4th Dist.) 149 N.E.2d 656, 659.

83. 359 U.S. 945, 3 L. Ed. 2d 678, *supra* 25.

84. *Smith* v. *Ill. Cen. R. Co.*, App. Ct. of Ill., 4th Dist., 172 N.E.2d 303, 304.

85. *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294, 299, 94 L. Ed. 100, 104; and see *Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359, 369-370, 96 L. Ed. 398, 407; *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U.S. 360, 1 L. Ed. 2d 889.

case, should this Court fail to protect Federal rights because of over-exacting local requirements, "desirable uniformity in adjudication of Federally created rights could not be achieved. The annotation found in 79 A.L.R. 2d at page 568 emphasizes the chaotic condition that will exist if it does not now exist, should the measure of the excessiveness of damages be considered a matter of local practice under the F. E. L. A. For example, it pronounces the Illinois rule to be that set forth in *Avance* v. *Thompson*, (*supra*, 31), which at the time had been overruled by *Pennell* v. *Baltimore & O. R. Co.*, (*supra*, 32), and makes no mention of *Deen* (*supra*, 25 and 32) or *Hust* (*supra*, 32). The supplement to the annotation[86] does pick up the *Smith* case (*supra*, 32), but both fail to make any mention of the Texas rule pronounced in *Kimbrell* (*supra*, 26). The only decision of the United States Supreme Court cited in support of the annotation sustains our position, in that it was there recognized that had the action of the state court in sustaining a verdict as not being excessive been "necessarily based upon an erroneous theory of Federal law," the same would have been reviewable by the U.S. Supreme Court.[87] That decision cited the *Bennett* case,[88] which held:

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86. Vol. 3, A.L.R. 2d Supplement Service, p. 1564

87. *Louisville & N. R. Co.* v. *Holloway*, 246 U.S. 525, 529, 62 L. Ed. 867, 870. As an example of the allowance of relief on a complaint of excessiveness of the verdict where an erroneous theory of Federal Law had been applied, the Court cited *C. & O. R. Co.* v. *Gainey*, 241 U.S. 494, 496, 60 L. Ed. 1124, 1125, which will be remembered as a case where it was successfully contended that the verdict was grossly excessive because the trial court failed to apply the proper Federal rule for the measurement of damages.

88. *Southern R. Co.—Carolina Division* v. *Bennett*, 233 U.S. 80, 87, 58 L. Ed. 860, 863.

"But a case of mere excess upon the evidence is a matter to be dealt with by the *trial court*."

The trial court had there deemed the verdict not to be excessive, just as the trial court did in the present case, and to our mind, our position finds support in the decision made. Contrary to the requirement of *Bennett*, the Court of Appeals in the case at bar has held that the question of excessiveness is not for the trial court, but for the Court of Civil Appeals on independent consideration, and later adjustment for clerical error.

It has been suggested that the states have gotten away with the "local practice" holdings because of the difficulty of securing review in this Court of a State Supreme Court decision ordering a new trial because of excessive damages.[89] The Mississippi *Smith* case[90] was cited as holding that a decision on excessiveness was not a final one of the state court, but it is believed that none of the cases cited in the Smith opinion dealt with a judgment where nothing else remained to be done following the filing of remittitur, and that the rule in *Atherton*[91] is the one that should be applied. The California Supreme Court opinion there required the party's consent to reduce damages because excessive, and this Court held:

"This consent has been given, as the record shows; and the judgment of the Court below is the judgment which the Supreme Court directed that court to enter and carry into execution. The litigation was ended by the decision of the Supreme Court. No discretion

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89. 17 *Ohio State Law Journal*, "Damages Under F.E.L.A.," pp. 474-475.

90. 295 U.S. 718, 79 L. Ed. 1673. *Mississippi Central R. Co. v. Smith*.

91. *Atherton et al. v. Fowler et al.*, 91 U.S. 143.

was left in the Court below if the required consent was given."

So it is in the present case

The Question of Expediency

"In all but three of the 50 states, either the highest court in the state or an intermediate appellate court, has some power to review the size of a verdict for excessiveness."[92]

So, we have not 57 but 47 varieties of appellate review, and it is fair to assume that in some of the jurisdictions, there might not be 11 wild cards, as in Texas (*supra* 13), but at least more than one intermediate appellate court. It would seem desirable for this Court to review the questions raised by petitioner and pronounce a uniform rule for the consideration of damages claimed to be excessive on appeal. It is believed that until the conflicts have been resolved the astute practitioner will owe it to his client in every F.E.L.A. case where a state court has ordered a remittitur to seek relief by application for writ of certiorari in this Court. In such situation, it would seem not only just but expedient for a standard to be erected that would be uniform in both Federal and state courts.

PRAYER

WHEREFORE, petitioner prays that a writ of certiorari be granted in order for this Court to review the record, opinion and final judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont, Texas, as rendered in this case, and on final hearing, the case be remanded to such court with directions to render

92. *Dagnello* v. *Long Island R. Co.*, 289 F 2d 797, 799

judgment affirming the judgment of the trial court, with all costs taxed against respondent, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

JONES, BRIAN & JONES,
P. O. Box 347,
Marshall, Texas,
BALDWIN & BALDWIN,
Mahon Building,
Marshall, Texas.

By: .....
Attorneys for Petitioner.

Of Counsel:

FRANKLIN JONES,
P. O. Box 347,
Marshall, Texas.

Date: .....

I certify that a copy of the foregoing Petition for Writ of Certiorari to The Supreme Court of Texas has been mailed on the day of , 1962, to the respondent's attorneys as follows: To Messrs. Orgain, Bell & Tucker, First Federal Savings Building, Box 1715, Beaumont, Texas.

.....
FRANKLIN JONES.

IN THE DISTRICT COURT OF JEFFERSON COUNTY, TEXAS.

No. B-76068

HOMER R. SIMMONS,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

Final Judgment

On the 9th day of January, 1961, the same being a day of the regular term of this Court, came on to be heard the above styled and numbered cause, and the parties appearing in person and through their attorneys respectively announced ready for trial;

Whereupon came a jury of twelve good and lawful men and women, towit: Phil W. Handley and eleven others, and after their due empanelment, they heard the pleadings, evidence, charge of the Court and argument of counsel, and on January 17, 1961, following presentation of the cause to them in charge by the Court, returned their verdict into open Court, which consisted of answers to special issues that resolved all issues of liability in favor of the plaintiff and against the defendant, and fixed the damages of the plaintiff at $139,615.00, which verdict was by the Court received and ordered filed.

And it having been made known to the Court that through agreement of the parties through counsel, the amount of $4,900.00 should be credited on said award of the jury in favor of the defendant, by reason of advance-

ments the defendant has heretofore made the plaintiff, and further, that the verdict of the jury embraced an award for time lost exceeding forty months of service from date of verdict;

It is therefore ordered, adjudged and decreed that the plaintiff, Homer R. Simmons, do have and recover of and from the defendant The Kansas City Southern Railway Company the sum of, towit: One hundred thirty-four thousand seven hundred and fifteen ($134,715.00) dollars, being the amount of said verdict of $139,615.00 less the credit due the defendant of $4,900.00, together with interest thereon from the date of judgment until paid at the rate of six (6%) percent per annum, and all costs of this suit, for all of which let execution issue.

To which action, the defendant duly excepted in open court.

s/ Gordon Gary,
Judge Presiding.

No. 6490

KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

VS.

HOMER R. SIMMONS, APPELLEE.

This is a suit for personal injuries brought by Homer R. Simmons against the Kansas City Southern Railway Company, under the Federal Employers Liability Act. Judgment was rendered for appellee Simmons in the amount of $139,615.00 based upon jury findings that appellant Railway Company was guilty of negligence and appellee was not contributorily negligent. The jury found appellant negligent in the following respects: (1) In fail-

ing to furnish a safe place to work. (2) In failing to provide sufficient help to plaintiff in removing the gate from under the train. (3) In dropping a portion of the gate without warning

Appellant contends there was no evidence to support the submission of Special Issue No. 2, relating to the failure to supply appellee sufficient help to remove the gate from the train. This is a question of law and is to be tested on appeal by considering only the evidence favorable to verdict and disregarding all other evidence. This incident occurred when appellee attempted to raise the end of a gate post which had become lodged beneath the train. Through a request for admission, it was proved that appellant's operating Rule No. 107 provided that all persons employed on a train must obey the instructions given by the conductor. The evidence also showed that if additional help was needed to dislodge the gate, the sole right and duty to provide that help was on the conductor. The conductor told appellee that if they could raise the gate they could slip it out from under the train. When appellee attempted to raise one end of the gate he sustained an injury to his back. The conductor testified he had tried to move the gate himself but could not move it before the attempt was made by appellee. It is clear in this state, the law imposes upon the employer the duty to exercise reasonable care in providing for an employee adequate help in the performance of work required of him. The duty is nondelegable and continuous, the rule being in principle the same as that requiring the employer to furnish his employee with safe instrumentalities and a safe place to work. *Western Union Telegraph Co. v. Coker*, 146 Tex. 190, 204 S.W.2d 977. The jury undoubtedly concluded the conductor, as a reasonable prudent person, should not have asked appellee to lift the gate without furnishing additional

help to accomplish this task. The submission of this issue was supported by the evidence.

Appellant also contends there was insufficient evidence to support the submission of Special Issue No. 2, discussed in the preceding paragraph. This court has considered all of the evidence in this record, both favorable and unfavorable to the finding of the jury, and hold the point is without merit.

In other points appellant complains of a definition given in connection with Special Issue No. 1, and of the lack of evidence and insufficiency of the evidence to support the submission of Special Issues Nos. 1, 1-A, and 3-B. If there was any error in the submission of this definition and these issues it was harmless error because the findings of the jury in answer to Special Issues Nos. 2 and 2-A were sufficient to support the judgment. *T. & N. O. Ry. Co.* v. *McGinnis*, 130 Tex. 338, 109 S.W.2d 160.

Appellant complains of the size of the verdict in the amount of $139,615.00, contending it is grossly excessive. The San Antonio Court of Civil Appeals, in an opinion by Justice Norvell, clearly sets forth the duty of the appellate court in its examination of this question in *Kimbriel Produce Co.* v. *Webster*, 185 S.W.2d 198, as follows:

"The record of the evidence here undoubtedly supports the award of a large sum of money or damages. The determination of the amount rests primarily with the jury, and there is no set formula applicable to cases of this character whereby the exact amount can be measured or ascertained. The amount of the award is not, however, free from control or revision by either the trial court or this court. The doctrine is now generally accepted that the verdict of the jury is subject to the supervision of the court whether such verdict is too large or too small. Prec-

edents are helpful and of some value in determining whether damages awarded for similar personal injuries are or are not excessive or inadequate, although it is conceded that no two injuries are alike in all particulars and do not have the same consequence or results insofar as damages are concerned. It is recognized that there should be reasonable uniformity as to the amount of verdicts and judgments in the various cases."

Appellee was 46 years of age at the time of injury, and 48 years old at the time of trial, with a life expectancy of 22.88 years. He engaged in work at cleaning and pressing, farming and in the oil field before his employment in 1942 with appellant. Appellee is a high school graduate with one semester of college work. In 1958, his last full year of work he earned a little over $7,000.00. On the date of the incident, he received two injuries to his back, one while trying to lift the gate and the other when the gate was suddenly dropped. His back has pained him almost continually since that time. He began to receive medical treatment consisting of heat treatment, bed rest and traction. Later he was given a brace to wear. His back continued to hurt and some two months after the injury he underwent a major surgery to remove a disc. He remained in the hospital about 22 days and went home to bed for an additional two weeks. There was no pain for two weeks following the operation, but then it returned and still existed at the time of trial. His testimony showed he worked for 9 days in a liquor store but quit because he could not move cases of liquor and beer. He testified he could not sit too long in one spot and could not stand on his feet too long. He tried hunting several times but could not walk long. He had not seen a doctor for about 5 months before the trial.

Dr. Heinz Faludi was the only doctor to testify. His testimony was given by deposition, the direct portions offered by appellee and the cross-examination by appellant. Dr. Faludi testified as to the history of appellee, including the operation removing the ruptured disc, which was performed by another doctor. He found the scar left by the incision, and tenderness over the lumbo-sacral region; weakness and atrophy in the right calf; lumbar lordosis reduced; motion of lumbar spine restricted; tenderness on the lumbo-sacral joint; tenderness over the right medium gluteal muscle; and radiculitis involving the S5 and L1 nerve root on the right. He recommended to appellee conservative treatment and if no rel ef, then a re-exploration operation to free the patient of the scar formation and possibly a posterior rhizotomy, which is cutting the pain fibers of the nerves, if the root was irreparably damaged. Later, he gave appellee a myelogram, which was his second, and found a questionable defect at L4 which he said was more likely old scar formation than new herniation. He stated: "I can't make any definite promise as to the success of the re-operation." He was asked if appellee was able to engage in work which required sustained heavy lifting, or stooping and bending, that sort of th ng, heavy manual labor, to which he answered: "I do not believe so, not in the condition he is in now." He testified: "I think an operation would stand a chance, probably better than an even chance to offer him some relief." "I think the pain is fa rly well localized and I think it would stand a fairly good chance of success." He was asked the question, "In other words, you may give him enough relief so he can engage in a remunerative employment, assuming that within reasonable probability that your operation is successful?" He answered, "Yes, sir." Also he testified: "Well, I think we would stand a reasonably good chance that the man could be improved and could be freed of some of his pain,

but I am not quite sure that he will definitely be able to go to heavy manual labor. I think he should be able to do moderate labor fairly well." Also: "I would feel he is stationary and with conservative treatment I very much doubt that he will substantially change." Also: "I believe he would not be in the good risk group any more. I think he would be probably somewhat in the poor risk group." At the time of trial appellee had declined a second operation.

This court will apply the rule set forth in *Wilson* v. *Freeman*, 108 Tex. 121, 185 S.W. 993: "All the Court of Civil Appeals can do, and all that is required of it to do * * * is to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation for the injury sustained, and treat the balance as excess * * * (Having) decided upon an amount that would be reasonable compensation * * * it should authorize a remittitur of the excess * * * in accordance with its sound judgment." The Supreme Court cited this rule in the case of *Flanigan* v. *Carswell*, 159 Tex. 698, 324 S.W.2d 835.

It is unnecessary for us to cite the multitude of cases which involve the amount of damages awarded for injuries more or less similar to those sustained by appellee here. They will be found collated in *Houston Belt & Terminal Ry. Co.* v. *Burmester*, 309 S.W.2d 271 and 17 Tex. Jur. 2d, Sec. 350 at p. 425.

After a careful consideration of the evidence and these authorities along with all others cited by appellee on this question, we have come to the conclusion that the verdict of the jury is excessive to the extent of $40,000.00. We regard the record as presenting a case of considerable past and probable future physical pain and mental suffering. We also have taken into consideration the deceased value

of the dollar at this time. We do not consider appellee as having been totally disabled as in the case, *City of Fort Worth* v. *Barlow*, 313 S.W.2d 906, in which the plaintiff was permanently paralyzed from the shoulder down, nor the case of *T. & N. O. Ry. Co.* v. *Flowers*, 336 S.W.2d 907, in which plaintiff sustained injuries requiring amputation of both legs and one arm. Upon the record, it is our duty to suggest a remittitur in accordance with Rule 440, Texas Rules of Civil Procedure.

If appellee will file in this court, within two weeks from the date of this judgment, a remittitur of $40,000.00, the judgment will be reformed and affirmed for the sum of $99,615.00; otherwise the judgment will be reversed and the cause remanded.

The judgment is affirmed conditionally.

s/ Homer E. Stephenson,
Associate Justice.

IN THE COURT OF CIVIL APPEALS, NINTH SUPREME JUDICIAL DISTRICT, BEAUMONT, TEXAS

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
HOMER R. SIMMONS,
Appellee.
No. 6490.

Remittitur by Appellee, Subject to the Overruling of His Motion for Rehearing

Subject to the action of this honorable court on the motion for rehearing filed by appellee herein, tendered herewith, and subject to further right of appellate review, and in obedience to the decision and order of this honorable

court under date of October 26, 1961, the appellee hereby files this, his remittitur of Forty Thousand and No/100 Dollars ($40,000.00), hereby releasing such amount of the judgment heretofore entered in his behalf in this cause, and requests that the remainder of the judgment be affirmed, in the event that his motion for rehearing be denied, as indicated by said decision and order of this honorable court.

This, the 1st Day of November, 1961.

s Homer R. Simmons,
Appellee.

THE STATE OF TEXAS
COUNTY OF HARRISON

Before Me, the undersigned authority, in and for said county and state, on this day personally appeared HOMER R. SIMMONS, well known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this the 1st day of November, 1961.

s Nell Rose Worley,
(Seal) Notary Public in and for Harrison County, Texas.

No. 6490

IN THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellant,

vs.

HOMER R. SIMMONS,
Appellee.

Motion for Rehearing on Behalf of Appellee

Comes now appellee and files this motion for rehearing and shows:

POINT OF ERROR ONE.

Error of the Court of Civil Appeals in requiring a remittitur in this case, for the reason that the effect of the same is to deprive appellee Simmons of the right of trial by jury, guaranteed in the Seventh Amendment to the Constitution of the United States.

POINT OF ERROR TWO.

The question of damages under the Federal Employers' Liability Act is one of Federal substantive law; consequently, a state court may not diminish or alter that right; and the Court of Civil Appeals erred in holding otherwise by requiring a remittitur in this case, as a condition of affirmance.

POINT OF ERROR THREE.

Under the Federal Employers' Liability Act, the finder of facts is exclusively vested with the prerogative of assessing reasonable compensation for damages; and the action

of the Court of Civil Appeals in substituting its judgment for that of the jury deprived Homer R. Simmons of his right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

POINT OF ERROR FOUR.

The test for measuring a jury verdict under the Federal Employers' Liability Act is whether the verdict is monstrous, and the Court of Civil Appeals erred in applying the test of "reasonable compensation," or any other standard than monstrosity.

POINT OF ERROR FIVE.

The test for measuring a jury verdict under the Federal Employers' Liability Act is whether the verdict of the jury is so excessive as that reasonable minds could not differ in the conclusion that it is too high, and that every doubt must be resolved in favor of the action of the trial court in sustaining the verdict, all of which matters present a question of law and not fact, so the Court of Civil Appeals erred in applying the factual test indicated in its opinion.

POINT OF ERROR SIX.

Even if the Court of Civil Appeals is authorized to substitute its views for that of the jury in a Federal Employers' Liability Act case, and apply the Texas test of excessiveness to it under Rule 440, Texas Rules of Civil Procedure, the Court of Civil Appeals erred in applying any supposed test of "reasonable compensation," the correct test being whether, from the record, the jury verdict is the result of passion, prejudice, or other improper motive in the assessment of damages.

POINT OF ERROR SEVEN.

The ascertainment and assessment of damages being an integral part of the right vouchsafed by Congress under the Federal Employers' Liability Act, Federal law applies to such ascertainment and assessment, and the Court of Civil Appeals erred in holding otherwise.

POINT OF ERROR EIGHT.

Under the Federal Employers' Liability Act, the test of excessiveness is whether there had been an abuse of discretion on the part of the trial judge in overruling the motion for new trial without requiring a remittitur; and the Court of Civil Appeals erred in holding otherwise.

POINT OF ERROR NINE.

The failure of the Court of Civil Appeals to hold or find that the trial judge abused his discretion in overruling the motion for new trial without requiring remittitur deprived the Court of Civil Appeals of the power to order reversal or remittitur.

POINT OF ERROR TEN.

Because there is in the record herein, a basis for mathematical computation of an amount in excess of the jury award, under the rule that every doubt must be given to the judgment of the court below, and because reasonable men could accordingly differ whether the verdict here is

excessive, the Court of Civil Appeals erred in requiring remittitur.

Respectfully submitted,

Jones, Brian & Jones,
P. O. Box 347,
Marshall, Texas,

By:
Attorneys for Appellee.

Judgment Rendered October 26, 1961.

The Kansas City Southern Railway Company,

No. 6490 vs.

Homer R. Simmons.

Appealed from the District Court of Jefferson County.

Opinion by Associate Justice Homer E. Stephenson.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court filed October 26, 1961, that there was excessive damages allowed in the judgment, it is therefore considered, adjudged and ordered that if appellee, Homer R. Simmons, files a remittitur in the amount of $40,000.00 within two weeks to reduce the amount of the judgment to $99,613.00, (sic) and the appellee, Homer R. Simmons, filed his remittitur in the above stated amount, it is the judgment of this court that appellee, Homer R. Simmons, recover of the appellant, The Kansas City Southern Railway Company, the remainder of the trial court's judgment being the sum of $99,615.00, and as modified, the judgment below is affirmed with all costs adjudged against the appellant, The Kansas City Southern Railway Company,

and the surety on its appeal bond, Central Surety and Insurance Corporation; and this decision be certified below for observance.

IN THE SUPREME COURT OF TEXAS.

January 31, 1962

No. A-8769.

From Jefferson County,
Ninth District.

Homer R. Simmons

vs.

The Kansas City Southern Railway Company.

Application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Homer R. Simmons, pay all costs incurred on this application.

No. 6490

IN THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AT BEAUMONT

KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

HOMER R. SIMMONS, APPELLEE.

Motion to Correct Judgment

Comes Now Appellant, and under the provisions of Rules 316 and 317 of the Rules of Civil Procedure, files this its motion requesting this honorable court to correct the judgment heretofore entered by said court in the above styled and numbered cause, and as grounds therefor, would show unto the court the following:

1.

Appellant would show unto the court that the jury in this cause originally returned a verdict in the sum of $139,615.00. That at the time the judgment was entered in the trial court, it was stipulated and understood between the parties and reflected in the judgment that the defendant was entitled to a credit of $4,900.00 and that the final judgment entered in said cause by the trial court included this item and gave credit for such amount heretofore paid by the defendant in the form of advancements and that the judgment in said cause was finally entered directing that the plaintiff recover of and from the defendant the sum of $134,715.00.

2.

Appellant would further show unto the court that in its opinion, the Court of Civil Appeals directed a remittitur in the sum of $40,000.00, and that subsequently, this honorable court, did enter a judgment to that effect but that at the time said judgment was entered, the court based its calculations on a judgment in the sum of $139,615.00, rather than the amount of the judgment which was actually entered by the trial court, to-wit: $134,715.00.

3.

Appellant would therefore show unto the court, that a mathematical error has occurred, and that the amount of the judgment, after the remittitur, should be the sum of $94,715.00, rather than the sum of $99,615.00 as reflected by the records of this court.

4.

Appellant therefore respectfully requests that this honorable court make such correction as are indicated and for such other relief as it may show itself entitled to receive.

Respectfully submitted,

Orgain, Bell & Tucker,
First Federal Savings Building,
Beaumont, Texas.

(Filed January 26, 1962.)

By Cleve Bachman,
Attorney for Appellant.

A copy of this motion has been mailed by Certified Mail, to counsel for Appellee, by posting a copy of same in the United States Mails, on this the ..... day of January, 1962.

Cleve Bachman.

No. 6490

KANSAS CITY SOUTHERN RAILWAY COMPANY.
APPELLANT.

vs.

HOMER R. SIMMONS.
APPELLEE.

The opinion in this case required a remittitur of $40,000.00, holding the jury verdict was excessive by that amount. Such opinion erroneously stated the judgment for appellee was $139,615.00, while in fact the judgment was $134,715.00. A credit of $4,900.00 had been given to appellant in the trial court for money advanced to appellee. Because of this clerical error the opinion set the amount to be $99,615.00, while such judgment should have been $94,715.00. The original opinion is hereby amended to show the affirmed judgment to be in the amount of $94,715.00.

/s/ Homer E. Stephenson,
Associate Justice.

(Filed March 29, 1962.)

T. R. C. P. 328.

New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.

T. R. C. P. 439.

If, in any judgment rendered in the district or county court, there shall be an excess of damages allowed, and before the plaintiff has entered a release of same in such court, in the manner provided by these rules, such judgment shall be removed to the Court of Civil Appeals, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such remittitur in the Court of Civil Appeals in the same manner as such release is required to be made in the district or county court. Upon such release being filed in said court, after revising said judgment, said Court of Civil Appeals shall proceed to give such judgment as the court below ought to have given if the release had been filed therein.

T. R. C. P. 440.

In civil cases appealed to a Court of Civil Appeals, if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

Article 1738, V. A. C. S.

The Supreme Court shall, as early as practicable after the 1st day of January and the 1st day of June of each year, equalize(d), as nearly as practicable, the amount of business upon the dockets of the several Courts of Civil Appeals as of the close of business on the 31st day of December and the 31st day of May of each year by directing the transfer of cases from such of said Courts as may

have the greater amount of business upon their dockets to those having a less amount of business. Said Court may, at any other time, order cases transferred from one Court of Civil Appeals to another, when, in the opinion of the Supreme Court, there is good cause for such transfer. * * *

Office-Supreme Court, U.S.
FILED
APR 19 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 565

HOMER R. SIMMONS,
Petitioner,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent.

SEPARATE APPENDIX TENDERED IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT, TEXAS

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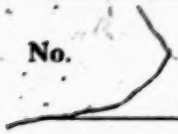
Of Counsel.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 

HOMER R. SIMMONS,
Petitioner,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent.

SEPARATE APPENDIX TENDERED IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT, TEXAS

The petitioner, *Homer Ray Simmons*, testified:

He was born November 22, 1912, and attained a high school education and one semester of college. His occupation experience consisted of employment in a dry cleaning and pressing shop, oil field work, farming, and railroad work, all of which required physical activity such as stand-

ing, walking, occasionally lifting heavy weights, and things of that character. His railroad experience began in April, 1942, when he hired out as a fireman with the respondent, receiving $6.95 a day as wages. The highest rate of pay given in those days was approximately $8.07 per hundred miles, but a fireman on a switch engine in 1959 received pay at the rate of $21.90 a day, and the job on which petitioner was firing when injured paid $17.22 for 100 miles. The last full year that the petitioner worked was 1958, and during which he earned a little over $7,000.00. In 1957, he earned about $7,400.00, and in 1956, $7,200.00 or $7,300.00.

The petitioner was promoted to locomotive engineer in 1953, and was qualified to work as such whenever a job opened, and indeed, had served as an engineer for short periods of time during 1956, 1957 and 1958. The respondent had in effect a seniority system under which the petitioner qualified both as a fireman and engineer, and the man next below the petitioner on the seniority list had worked in the capacity of a locomotive engineer ever since the date of petitioner's injuries, May 10, 1959. The wages of an engineer would be about $9,000.00 a year or maybe a little more, and a road fireman's salary would run between $7,500.00 and $8,600.00 a year (S. F. 70).

On May 10, 1959, as the train on which petitioner was working negotiated a crossing with the track of another carrier, a wooden crossing gate blew into the side of the train so as to lodge between the truck housing and the car body of the second baggage coach. In assisting to dislodge the gate and carry the broken portion thereof across another track of the respondent, so as to throw it on the right of way, petitioner injured his back when straining on the gate and again when those helping to throw it to the side of the right of way dropped their end of the load without warning, so as to give the petitioner an awfully severe jerk as

the entire weight of the load of 300 to 350 lbs. was thrown upon him. This occasioned "an awful pain" in the small part of petitioner's back, but he returned to the engine and completed his run, although enduring pain and nausea most of the day.

Despite the continuing pain, after spending the night at the end of his run at Port Arthur, the petitioner returned to his home at Shreveport the next day, by which time he was enduring a sharp pain in the small of his back and his right leg had begun to feel numb. He was unsuccessful in his efforts to see any of the doctors on the hospital association staff of The Kansas City Southern Hospital Employees Hospital Association before the following Thursday, but did see them on Thursday, following which he was hospitalized, and given heat treatments through Friday and Saturday. On the next Monday, he was put in traction at another hospital and remained in it for a week. He was never completely free of pain, which continued in his back, along with the sensation of the right leg and foot being asleep at all times. He was sent home thereafter by Dr. Rushing of the hospital staff, who was in charge of the case.

By the time he left the hospital, the pain had increased to where he could hardly stand it in his back, and when he was gotten home, he was put in bed and treated by his wife with rubbing, heat and liniment. Later, he was referred to Dr. Boykin and placed in a sanitarium for additional continuous traction treatment, interrupted by physiotherapy over a period of 12 days. He had received no relief from his back pain, and the leg had likewise continued to have the sensation of being asleep. The petitioner was then referred to Dr. Oxford, upon recommendation of a claim agent for the respondent. Following an x-ray examination, this doctor advised petitioner that he had a ruptured disc in his back that needed to come out. The pe-